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No. 85-1095

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NORMAN O. AAMODT and MARJORIE M. AAMODT,
Petitioners,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,
and
METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY, PENNSYLVANIA ELECTRIC COMPANY and GPU NUCLEAR CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS METROPOLITAN EDISON COMPANY, ET AL., IN OPPOSITION TO CERTIORARI

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January 22, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission abused its discretion in denying a motion to reopen the record filed by petitioners during the course of the six-year administrative proceeding to consider whether to permit restart of the undamaged Three Mile Island Nuclear Station, Unit 1 following the 1979 accident at Three Mile Island, Unit 2.*

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* Pursuant to Supreme Court Rule 28.1, respondents state that Metropolitan Edison Company, Jersey Central Power & Light Company, Pennsylvania Electric Company and GPU Nuclear Corporation are subsidiaries of General Public Utilities Corporation. GPU Service Corporation and Saxton Nuclear Experimental Corporation are also subsidiaries of General Public Utilities Corporation.

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BRIEF OF RESPONDENTS METROPOLITAN EDISON COMPANY, ET AL., IN OPPOSITION TO CERTIORARI

Respondents Metropolitan Edison Company, Jersey Central Power & Light Company, Pennsylvania Electric Company and GPU Nuclear Corporation (hereinafter collectively referred to as "GPU Utilities") submit this brief in opposition to the petition for a writ of certiorari filed by petitioners Norman O. Aamodt and Marjorie M. Aamodt (hereinafter referred to as "the Aamodts").

STATEMENT OF THE CASE

GPU Utilities are the owners and operator of a two-unit nuclear power plant near Middletown, Pennsylvania, known as Three Mile Island Nuclear Station, Units 1 and 2 ("TMI-1" and "TMI-2").[1] At the time of the accident at TMI-2 on March 28, 1979, TMI-1 was shut down for refueling and normal maintenance. TMI-1 was not involved or damaged in the accident. Nevertheless, on July 2, 1979, the Nuclear Regulatory Commission ("NRC") took the extraordinary step of issuing an immediately effective order—without prior notice or hearing—requiring that TMI-1 remain shut down until after a public adjudicatory hearing to determine whether there was reasonable assurance that TMI-1 could be restarted and operated without endangering the health and safety of the public. 44 Fed. Reg. 40,461 (July 10, 1979). On August 9, 1979, the NRC issued a further order specifying the procedural format for the restart hearing and the issues to be considered, including plant design and procedures, emergency planning, management capability and technical resources, and operator training. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-79-08, 10 N.R.C. 141 (1979). An Atomic Safety and Licensing Board comprised of three administrative judges was established to conduct the proceeding and to make a recommendation on restart of TMI-1; the final decision on whether to allow restart was reserved to the Commission itself. 10 N.R.C. at 146-47, 149. The Commission anticipated that the proceeding would take about one year. 10 N.R.C. at 152.

The procedures selected by the NRC for the TMI-1 restart proceeding were uniquely tailored to the peculiar

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[1] TMI-1 and TMI-2 are jointly owned by Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company. Until January 1982, Metropolitan Edison Company was the NRC-licensed operator of TMI-1 and TMI-2. Since then, GPU Nuclear Corporation, a newly formed company, has been the licensed operator of both units.

circumstances of the case at hand. Indeed, we are aware of no other case in which the NRC has imposed an immediately effective license suspension, with restart to be preceded by a public adjudicatory hearing, and with the Commission itself to make the restart decision after receiving recommendations from the Licensing Board presiding over the hearings. The restart proceeding was also an unusually long and intense case, and it generated a record of enormous proportions. The proceedings before the NRC are succinctly summarized in the court of appeals' opinion below. *Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720, 722-27 (3d Cir. 1985); Petitioners' Appendix ("Pet. App.") at 11A-23A (hereinafter cited as "*TMIA v. NRC*").

The Aamodts intervened and actively participated in the TMI-1 restart proceeding beginning in 1979. On June 21, 1984—after the hearing record had been closed—the Aamodts filed a motion with the Commission alleging that residents living near TMI-2 had suffered severe radiation health effects as a result of airborne radioactive materials released during the early hours of the 1979 accident. The Aamodts' motion was based on an anecdotal, door-to-door "health survey" conducted by Marjorie Aamodt and others, which allegedly revealed an elevated cancer incidence, as well as other assorted ailments and "flora growth abnormalities." The motion asked the Commission to investigate the Aamodts' allegations and to defer restart of TMI-1 pending the outcome of the investigation. On December 13, 1984, after hearing from the other parties and its own Staff, the Commission denied the motion. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-22, 20 N.R.C. 1573 (1984). The Commission concluded that the Aamodts' health survey had "no scientific basis" and was inconsistent with the large body of existing scientific studies establishing that the small amounts of radiation released during the TMI-2 accident posed minimal health risks to the population. 20 N.R.C. at 1575. The Com-

mission also pointed out that the Pennsylvania Department of Health was already in the process of conducting epidemiological research in the TMI area and was aware of the Aamodts' allegations. *Id.* The Commission promised to take appropriate action if the research by Pennsylvania demonstrated any risk to the public health and safety. *Id.*

On January 15, 1985, the Aamodts filed a motion asking the Commission to reconsider its December 13 denial and also requesting—for the first time—that the record be reopened in the TMI-1 restart proceeding. The Aamodts later supplemented their motion with additional information and argument on March 6, 1985 and April 13, 1985. On May 16, 1985, the Commission denied the motion to reconsider and to reopen. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-08, 21 N.R.C. 1111 (1985). The Commission applied its traditional three-prong standard for ruling on motions to reopen the record and found that the Aamodts' motion failed on all three prongs. First, the motion was untimely because the pertinent information was known no later than June 1984, but the Aamodts had waited until January 1985 before requesting that the record be reopened. 21 N.R.C. at 1114. Second, the motion did not raise any significant safety or environmental issue. The Aamodts' information was "fragmentary and anecdotal" and did not cast any serious doubt on the host of prior studies and NRC Staff investigations which established that little radiation was released during the accident and that the resulting health effects would be negligible. 21 N.R.C. at 1114-16. Third, the information presented by the Aamodts would not lead to a different result in the TMI-1 restart proceeding because any health effects resulting from the TMI-2 accident are unrelated to the question of whether TMI-1 can be safely operated today. 21 N.R.C. at 1116.

Based on the entire record of the six-year restart proceeding, the Commission on May 29, 1985 issued a de-

cision concluding that TMI-1 could be returned to operation without undue risk to the public health and safety. The Commission therefore lifted the 1979 immediately effective suspension of the TMI-1 operating license. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-09, 21 N.R.C. 1118 (1985) (Pet. App. 77A).

Immediately after the NRC's decision, the Aamodts and other parties filed petitions for review in the Third Circuit and sought an emergency stay of the restart authorization.[2] On June 7, 1985, the court of appeals granted a stay of restart pending expedited briefing and argument on the merits. The case was argued on June 27, 1985, and on August 27, 1985, the court of appeals issued its decision and judgment affirming the NRC's decision. *TMIA v. NRC*, 771 F.2d 720 (3d Cir. 1985) (Pet. App. 6A). With respect to the Aamodts' health effects claims, the Third Circuit panel's decision was unanimous. Despite the favorable decision, the court of appeals kept its stay of restart in place pending any petitions for rehearing en banc. Such petitions were filed, and on September 19, 1985, the court of appeals denied rehearing and rehearing en banc. (Pet. App. 271A.) The court of appeals once again kept its stay in effect pending any application for a stay to this Court. Three Mile Island Alert, Inc. made application to Justice Brennan for such a stay, which was granted on September 24, 1985 pending receipt of responses to the stay application.[3] *Three Mile Island Alert, Inc. v. NRC*, No. A-235 (Brennan, J., in chambers). Justice Brennan re-

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[2] The other parties seeking review in the court of appeals were Three Mile Island Alert, Inc., Union of Concerned Scientists and the Commonwealth of Pennsylvania. None of these other parties joined in the Aamodts' health effects claims, and none of them has sought certiorari in this Court.

[3] The Aamodts filed a response in support of TMIA's stay application but did not file a separate application.

ferred the stay application to the Court, and on October 2, 1985, the Court denied the application, with Justice Brennan dissenting. 106 S. Ct. 32. Shortly thereafter, GPU Nuclear began its three-month start-up program for TMI-1. With the start-up program having been successfully completed, TMI-1 is currently in commercial operation.

REASONS FOR DENYING THE WRIT

The writ should be denied because the issues presented do not involve any important question of federal law or public policy, and the decision below is unlikely to have any impact beyond the particular facts and circumstances of this case. The key issues here are purely factual in in nature, namely, the amount of radiation released during the TMI-2 accident, the health effects to be expected from the radiation released, and whether the NRC acted within its discretion in relying on a large body of scientific evidence rather than the Aamodts' unscientific survey.[4] The court of appeals has already reviewed the facts in detail and concluded that the NRC's decision was sound. There is no need for this Court to undertake a second appellate review of those same facts. Furthermore, the TMI-1 restart proceeding was procedurally unique. There has been no other NRC proceeding like it, and no one would argue that another is likely to occur again in the future. Neither the NRC decision nor the Third Circuit opinion is likely to have any far-reaching precedential effect, and there is no important recurring question of administrative law or procedure requiring Supreme Court review.

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[4] Scattered throughout the Aamodts' petition are passing references to the so-called "Hartman Allegations" relating to leak rate testing at TMI-2 before the accident. The Aamodts do not attempt to set forth any independent argument relating to these allegations. In any event, the allegations were the subject of a separate motion to reopen the record, and the issues raised are purely factual ones that were properly resolved by the NRC and the court of appeals.

The writ should also be denied because the decision below is not in conflict with any decision of another court of appeals nor any decision of this Court. Given the factual nature of the decision below, it would be surprising to find a direct conflict with some other decision in a different case.

Finally, the writ should be denied because it is clear that the NRC and the court of appeals both disposed of the Aamodts' claims correctly. The Aamodts' health survey was unscientific, methodologically flawed and inconsistent with the vast body of scientific knowledge on the health effects of the TMI-2 accident. The survey was scientifically worthless, and the expert agency was fully justified in denying the motion to reopen the record that was based on the survey. After reviewing the facts in detail, the court of appeals correctly affirmed the NRC's decision. As discussed more fully below, all of the Aamodts' substantive attacks on the decisions of the NRC and the court of appeals are wholly without merit.

I. THE NRC PROPERLY DENIED THE AAMODTS' MOTION TO REOPEN THE RECORD

Under long-standing NRC practice, there are three factors to be considered in ruling on a motion to reopen the record: (1) whether the motion is timely; (2) whether the motion raises a significant new safety or environmental issue; and (3) whether a different result might have been reached if the new information had been considered initially.[5] The NRC applied this test to the

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[5] The NRC has been applying this test for many years. *See, e.g., Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 N.R.C. 320, 338 (1978) and cases cited therein. At least one other court of appeals, in addition to the court below, has approved the NRC's three-part test. *See San Luis Obispo Mothers For Peace v. NRC*, 751 F.2d 1287, 1318 (D.C. Cir. 1984). We are not aware of any court that has questioned the validity of this test.

Aamodts' motion to reopen the record and found that the motion failed under all three criteria. The most serious failing was under the second criterion—the motion completely failed to raise any significant safety or environmental issue. The crux of the Aamodts' motion was an informal, door-to-door health survey conducted by Marjorie Aamodt and others in selected neighborhoods around TMI. According to the Aamodts, the survey revealed a substantially elevated cancer incidence as well as various other ailments and abnormal growth patterns in plants. From this, the Aamodts concluded that large amounts of radiation must have been released during the TMI-2 accident.

In denying the Aamodts' motion, the NRC relied on a large body of about 70 scientific reports that contradict the Aamodts' allegations. Numerous studies were performed by the NRC Staff, other federal and state agencies, and independent third parties after the TMI-2 accident. The studies establish that the radiation released during the accident was minimal and resulted in extremely small radiation doses to the surrounding population—far smaller than the doses received by the residents every year from natural background radiation. For example, the President's Commission on the Accident at Three Mile Island formed a special Task Force, staffed with highly qualified professionals, to investigate the health effects of the TMI-2 accident. *See* The President's Commission on the Accident at Three Mile Island, *Reports of the Public Health and Safety Task Force* (Oct. 1979). The Task Force concluded that the accident resulted in an additional radiation dose of only 6.5 millirem ("mrem") to the average individual living within 10 miles of the plant and a dose of 20-70 mrem to maximally exposed individuals. *Id.* at 8-9. These doses can be compared with an average annual dose from natural background radiation of 116 mrem in Harrisburg and 193 mrem in Denver. *Id.* at 7. Thus, a person who remained in the TMI area during the

accident received about the same additional radiation dose as a person who left the area and went to Denver for a short vacation. *Id.* at 9.

The Task Force also investigated the likely health effects resulting from the radiation released during the accident. Based on the conservative risk estimation techniques generally accepted in the scientific community, the Task Force concluded that there would be 0.7 additional cancer deaths due to the accident during the remaining lifetime of the population living within 50 miles of TMI. *Id.* at 15. Subsumed within this overall risk estimate is a 50% chance that there will be *no* additional cancer deaths. *Id.* In the same population, it is expected that there will be 325,000 cancer deaths unrelated to the TMI-2 accident. *Id.* Overall, the Task Force concluded that "*there may be no additional deaths due to this radiation, or if there are, they will be so few that it will never be possible to determine that even a single death occurred as a consequence of the accident at TMI.*" *Id.* (emphasis in original).[6]

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[6] Many other studies reached essentially the same conclusion. *See, e.g.*, NRC, NUREG-0558, *Population Dose and Health Impact of the Accident at the Three Mile Island Nuclear Station* 57, 60 (May 1979) (average dose from accident was between 1.5 mrem and 8 mrem; less than one additional fatal cancer expected); NRC, NUREG/CR-1250, NRC Special Inquiry Group, *Three Mile Island—A Report to the Commissioners and to the Public* 408 (1980) (discernible radiation health effects from TMI-2 accident "extremely unlikely" to occur in any individual; effects on population as a whole "will certainly be nonmeasurable and nondetectable"); Committee on Federal Research into the Biological Effects of Ionizing Radiation, *Follow-up Studies on Biological and Health Effects Resulting from the Three Mile Island Nuclear Power Plant Accident of March 28, 1979*, NIH Publication 79-2065, at 4 (Aug. 1979) (TMI-2 accident did not cause a "significantly increased risk of cancer" or other health effects; even if the study underestimates the risk by a factor of 100, the health effects would still be "too small to be detected").

The NRC also noted correctly that the Aamodts' survey was riddled with serious methodological flaws and was wholly unscientific. For example, the survey results can be accepted only by disregarding well-established cancer latency periods. It is universally agreed that there is a long latent period (10-20 years) between exposure to radiation and the onset of most types of cancer.[7] The cancers reported by the Aamodts in 1984 could not possibly have been caused by exposure to radiation from the accident in 1979. Indeed, in their June 1984 motion, the Aamodts candidly acknowledged that their contention "defies the generally accepted theory of a period of considerable latency following [radiation] exposure."[8] Another flaw in the Aamodts' survey was its failure to identify when the cancer cases had been diagnosed. The cancers may have been in existence long before the TMI-2 accident, and the survey therefore fails to establish any causal link between the accident and the elevated cancer incidence alleged by the Aamodts. This deficiency in the Aamodts' survey was noted by the Centers for Disease Control ("CDC"), which had been asked by the NRC Staff to review the survey. CDC concluded that the Aamodts had failed to present reliable or convincing evidence of increased cancer incidence related to the TMI-2 accident. *See* CLI-84-22, 20 N.R.C. at 1574. CDC also found that the survey was unsystematic, subject to interviewer bias, and lacking in any comparison to a suitable control group. *See TMIA v. NRC*, 771 F.2d at 737 (Pet. App. 44A).

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[7] *See, e.g.*, NRC, NUREG/CR-1728, *The Feasibility of Epidemiological Investigations of the Health Effects of Low-Level Ionizing Radiation* at v (Nov. 1980).

[8] Aamodt Motions For Investigation Of Licensee's Reports of Radioactive Releases During The Initial Days Of The TMI-2 Accident And Postponement Of Restart Decision Pending Resolution Of This Investigation, June 21, 1984, at 8.

As a scientific matter, the radiation from the accident could not have caused the cancers and other health effects alleged by the Aamodts. It was plainly appropriate for the NRC to rely upon the established body of scientific literature rather than the Aamodts' informal survey.

In disposing of the Aamodts' contentions, both the NRC and the court of appeals noted that the Pennsylvania Department of Health was conducting research into the health effects of the TMI-2 accident. *TMIA v. NRC*, 771 F.2d at 737 (Pet. App. 44A-45A); CLI-84-22, 20 N.R.C. at 1575. The NRC promised to take appropriate action if the research demonstrated that any significant health effects were caused by the accident. The Pennsylvania Department of Health completed its research and in September 1985 issued its report.[9] The report is entitled "Cancer Mortality and Morbidity (Incidence) Around TMI" and was prepared by qualified professionals employed by the Division of Epidemiology Research of the Pennsylvania Department of Health. The principal conclusions of the research team are set forth in the "Prologue and Summary" at the beginning of the report. The overall conclusion was that there is no "evidence of an increased risk of developing cancer by local residents living near the TMI nuclear facility." Prologue and Summary at 9.

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[9] Although the report is not in the record, it is appropriate to consider it here for three reasons. First, the ongoing research by the Pennsylvania Department of Health was one of the bases for the NRC's decision, which was noted by the court of appeals in its opinion. Second, in support of TMIA's application for a stay to Justice Brennan, the Aamodts filed a lengthy rebuttal of the Pennsylvania study. *See* Aamodt Response in Support of Three Mile Island Alert, Inc.'s Application for Continuation of Stay Order, Exhibit A, filed Sept. 27, 1985 in *TMIA v. NRC*, No. A-235. Third, the Aamodts have invited discussion of the report by arguing in their petition (p. 21) that the reviewing court should "look outside the administrative record" in ruling on their health effects contentions.

The report also specifically addressed the Aamodts' health survey and reached the following conclusions:

- The Aamodts' survey is defective because of a serious "selection bias." Specifically, the Aamodts' selection of streets and households to survey "was influenced by the pre-existing knowledge of cancer deaths, i.e., only those streets where cancer deaths were known to be present were chosen, ignoring other streets in the same area where no cancer deaths were reported. Because of this selection bias, the results of the Aamodt analyses are invalid." Prologue and Summary at 12.

- Of the 20 cancer deaths attributed by the Aamodts to the TMI-2 accident in 1979, one died of a cause other than cancer; six were diagnosed as having cancer prior to the accident; two were long-term heavy smokers who died of lung cancer; and the remainder represented a variety of cancers normally found in any population group. *Id.* at 14.

- The Aamodts' allegations are inconsistent with the normal radiogenic cancer latency period of 10-20 years. Leukemia is the only cancer that could occur within 5-6 years after radiation exposure, but no increased incidence of leukemia was found. *Id.* at 7-8, 13. Moreover, of the two leukemia cases reported in the Aamodts' survey, one was diagnosed three years before the accident and the other occurred in a person who was not a resident of the TMI area at the time of the accident. *Id.* Table 4.

- Certain specific forms of cancer are more likely to occur following radiation exposure. When, as in the Aamodts' survey, many different types of cancer are reported, "it suggests an absence of a single causal relationship." *Id.* at 13.

- The Aamodts' survey is defective because it fails to consider (a) cancer incidence (as opposed to mortality) data; (b) age and sex distributions of

the local populations; and (c) the many people who moved into and out of the area after the accident. *Id.* at 12-14.

As a result of the study by the Pennsylvania Department of Health, the Aamodts' position is now completely discredited. There can be no doubt that the NRC was correct in rejecting the Aamodts' unfounded allegations.

The Aamodts also made other miscellaneous allegations in support of their motion to reopen the record, all of which were equally baseless. For example, the Aamodts alleged that there was an increase in neonatal hypothyroidism as a result of the TMI-2 accident. Hypothyroidism was investigated in 1980 by the Pennsylvania Department of Health, which concluded that none was caused by the TMI-2 accident. *See* CLI-85-08, 21 N.R.C. at 1115.[10] The issue was also litigated before the NRC Licensing Board in the context of assessing the adequacy of emergency planning. The Licensing Board likewise concluded that there was no relationship between the TMI-2 accident and any increased incidence of neonatal hypothyroidism. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-59, 14 N.R.C. 1211, 1593-96 (1981), *aff'd*, ALAB-697, 16 N.R.C. 1265, 1283-88 (1982).

The Aamodts also claimed that dangerous levels of transuranic materials were released into the atmosphere during the accident. The NRC thoroughly examined this contention and rejected it as unfounded. Actual air and soil samples taken around the TMI site during and after the accident showed no unusual levels of transuranic ma-

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[10] The Pennsylvania Department of Health formed a special Hypothyroidism Epidemiological Investigative Committee to investigate the alleged increase in neonatal hypothyroidism. *See* Tokuhata & Digon, *Fetal and Infant Mortality and Congenital Hypothyroidism Around TMI*, presented at the International Symposium on Health Impacts of Different Sources of Energy, Nashville, Tenn., June 22-26, 1981.

terials. *See* CLI-85-08, 21 N.R.C. at 1116. Moreover, in 1984 a team composed of NRC, Environmental Protection Agency and Pennsylvania officials went with the Aamodts to three locations selected by the Aamodts. Sophisticated equipment was used to measure radiation levels, including alpha radiation which would continue to be emitted by any transuranics released in 1979. No unusual radiation levels were found. *See* CLI-84-22, 20 N.R.C. at 1575. In support of their argument concerning transuranics, the Aamodts rely upon allegations made by Dr. Carl Johnson on behalf of the Aamodts at a Commission meeting on May 22, 1985. (Aamodt Pet. at 5-6.) Dr. Johnson has become somewhat notorious in that his opinions are generally at odds with those of the scientific community. For example, in another case involving radiation exposure the court concluded that "either Dr. Johnson is correct or the rest of the world is correct. This Court has no faith in Dr. Johnson's opinions." *Johnston v. United States*, 597 F. Supp. 374, 417 (D. Kan. 1984). Under the circumstances, and having been presented with informed scientific evidence to the contrary,[11] the NRC was clearly justified in rejecting the Aamodts' transuranic claims.

Finally, the Aamodts claimed that Metropolitan Edison Company, the operator of TMI-2 in 1979, destroyed radiation monitoring records and attempted to mislead the public about the amount of radiation released during the accident. This was nothing more than malicious speculation by the Aamodts. They presented no evidence substantiating their claims, and there is none. For example, the Aamodts claimed that on the day of the accident, Metropolitan Edison misled the Pennsylvania Bureau of Radiation Protection concerning radiation measurements. The NRC properly concluded that this claim was based on an erroneous NRC draft document and that the claim was

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[11] *See, e.g.*, NRC Staff's Answer to Amendment to Aamodt Motion of January 15, 1985, dated May 6, 1985, attached affidavit of William D. Travers.

entirely unfounded. CLI-85-08, 21 N.R.C. at 1116. It is also worth noting that if, as the Aamodts allege, Metropolitan Edison had destroyed records and deceived the public to conceal a large radiation release, measurable quantities of that radiation would still be present in the environment. The actual measurements taken by the NRC, including measurements taken at locations specified by the Aamodts, showed no such radiation, which completely disproves the Aamodts' allegations.[12]

In short, the NRC was clearly correct in denying the Aamodts' motion to reopen the record, and the court of appeals properly affirmed the Commission's decision. Nothing in the Aamodts' petition to this Court demonstrates that the decisions below were incorrect or that they should be reviewed on certiorari. The Aamodts now argue, for example, that the court of appeals gave too much deference to the NRC's decision. (Aamodt Pet. at 20-22.) Yet it is well established that when the NRC is making a scientific determination, the "reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). In this case, the NRC was clearly making such a scientific determination concerning radiation releases, off-site radiation doses, and radiation health effects. The NRC's primary function is to protect the public from radiological hazards. 42 U.S.C. §§ 2012, 5801. The Commission has developed great expertise in the radiological sciences to carry out its statutory mandate, and its scientific judgments in this field are entitled to substantial judicial deference.

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[12] At the May 22, 1985 Commission meeting, Commissioner Bernthal pointed out to the Aamodts that if their claims were true, the radiation would still be detectable in the environment around TMI. He noted, however, that no one had found any such radiation beyond background levels. Transcript of May 22, 1985 Meeting at 70-75.

The Aamodts also contend that they had a due process right to an adjudicatory hearing on their claims. This is nonsense. It was long ago established by this Court that motions to reopen the record are not a matter of right, but rather are addressed to the discretion of the agency. *ICC v. Jersey City*, 322 U.S. 503 (1944). The Court held:

> If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body.

322 U.S. at 514-15. There is no due process right to have the record reopened in an administrative proceeding. *See United States v. ICC*, 396 U.S. 491, 520-21 (1970). The NRC's procedural obligations to the Aamodts were satisfied when the Commission duly considered and ruled on their various motions. There is no obligation to reopen the record and conduct hearings on every allegation that a party is able to conjure up and put down on paper. If that were the law, NRC proceedings would never end, given the fertile imagination of most disappointed litigants. An agency has broad discretion to control its proceedings and decline litigation of issues it finds insignificant. As the court below pointed out, "[a]t some point, however, proceedings must terminate in outcomes." *TMIA v. NRC*, 771 F.2d at 740 (Pet. App. 51A).

The Aamodts attempt to bolster their due process argument by contending that the NRC departed from its usual procedures in structuring and conducting the TMI-1

restart proceeding (Aamodt Pet. at 22-24).[13] It is true that the NRC selected a unique procedure to handle a unique case. For that very reason, the decision below will have little impact beyond the particular facts and circumstances of this case. There is therefore no reason for review on certiorari. In any event, the NRC has broad latitude to structure its procedures so as to meet its statutory objectives in an efficient and effective manner. Indeed, the NRC regulatory scheme is "virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *TMIA v. NRC*, 771 F.2d at 727, *quoting Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968) (Pet. App. 23A). *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-44 (1978). Here, the structure of the restart proceeding violated no statute or regulation, and, as the court of appeals noted, the "procedures chosen by the Commission well served their intended purpose." *TMIA v. NRC*, 771 F.2d at 740 (Pet. App. 51A). The court of appeals was correct, and there is no reason for this Court to undertake yet another review of the particular procedures selected by the NRC.

At various places throughout their petition, the Aamodts refer in passing to the "Hartman Allegations." The so-called Hartman Allegations have nothing to do with the Aamodts' health effects contentions, and the Aamodts make no attempt whatsoever to develop an intelligible argument concerning the Hartman Allegations. For that

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[13] One of the Aamodts' principal procedural complaints appears to be that in 1979 the NRC ordered TMI-1 shut down without prior notice or a hearing. (Aamodt Pet. at 8 n.5, 23.) This order inured to the detriment only of GPU Utilities, not the Aamodts. The Aamodts have consistently opposed operation of TMI-1. They have no standing to complain of the shut-down order, and it is ironic, to say the least, for the Aamodts to argue now that the NRC should not have shut down TMI-1 during the pendency of the proceeding.

reason alone, the issue need not be considered by the Court. *See* Supreme Court Rule 21.5. In any event, the Hartman Allegations were the subject of a separate motion to reopen the record, which the NRC properly denied under the facts and circumstances presented. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-02, 21 N.R.C. 282 (1985). The court of appeals correctly affirmed the Commission's ruling on this motion, holding that the issue had no safety significance with respect to current operation of TMI-1 and would be addressed in a separate NRC proceeding. *TMIA v. NRC*, 771 F.2d at 732-35 (Pet. App. 34A-40A). The issues involved in the Hartman Allegations are purely factual in nature and have little significance except to the parties in this particular case. Supreme Court review is therefore unwarranted.

In summary, the NRC clearly acted well within its discretion in denying the Aamodts' motion to reopen the record. The court of appeals properly affirmed the Commission's decision, and there is no basis for further appellate review in this Court. Accordingly, the Aamodts' petition should be denied.

II. THE AAMODTS' NEPA CLAIM WAS NOT PROPERLY RAISED BELOW AND IN ANY EVENT IS WITHOUT MERIT

The Aamodts claim that the NRC violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 ("NEPA"), because it failed to prepare a supplemental Environmental Impact Statement ("EIS") to consider the cumulative health effects of the allegedly high levels of radiation released during the TMI-2 accident and the low-level radiation to be released during normal operation of TMI-1. (Aamodt Pet. at 14-17.) The claim is unworthy of Supreme Court review because it was never properly raised below and because the claim is insubstantial under settled NEPA law.

Early in the restart proceeding, the NRC considered the issue of whether a supplemental EIS should be prepared to assess the effects of renewed operation of TMI-1. The Aamodts argued in favor of an EIS in a letter dated November 30, 1979. (Pet. App. 275A.) Their letter mentioned the effects of radiation from all nuclear plants within 50 miles of TMI and the fall-out from atmospheric testing of nuclear weapons; it did not clearly address the effects of the TMI-2 accident. Following its usual procedures, the NRC Staff prepared an Environmental Impact Appraisal ("EIA") to determine whether an EIS was necessary. The Staff issued the EIA on March 27, 1981; it concluded that no EIS was required because there had been no environmentally significant change in circumstances since the original EIS was prepared at the time TMI-1 was licensed. The Aamodts made no objection whatsoever to the EIA, although other parties did object on grounds other than those raised by the Aamodts now.

On December 15, 1981, the Licensing Board ruled that the EIA was adequate and that there was no need for an EIS. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-60, 14 N.R.C. 1724 (1981). The Aamodts made no attempt to appeal the Licensing Board's ruling within the NRC, although one other party did so on an unrelated issue. The NRC's Appeal Board affirmed. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-705, 16 N.R.C. 1733 (1982). Once again, the Aamodts failed to seek Commission review of the Appeal Board's decision. Another party did so, and the Commission denied review on March 10, 1983. The Aamodts also failed to raise the issue in connection with their later health survey and the related pleadings that they filed with the NRC beginning in June of 1984. None of those pleadings mentions the NRC's EIA, the need for a supplemental EIS, or the requirements of NEPA.

Intervenors who wish a NEPA issue to be considered have an obligation to raise the issue directly and explain it clearly. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978). The Aamodts failed to do so here. Despite many opportunities, the Aamodts failed to argue that an EIS should be prepared to consider the cumulative effects of radiation released during the accident and radiation released during normal operation of TMI-1. Having failed to raise the issue before the agency, the Aamodts are not entitled to judicial review of the issue in this Court or any other court. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Comm'n v. Aragan*, 329 U.S. 143, 155 (1946).

The Aamodts likewise failed to raise their NEPA claim in the court of appeals. The Aamodts' brief to the Third Circuit made no mention of NEPA and only a passing reference in a footnote to the lack of a supplemental EIS.[14] The Aamodts made no attempt to present an argument on the point in their brief. As a result, the court of appeals did not decide the issue or even address it.[15] Review in this Court is inappropriate when the question presented has not been briefed, argued or decided in

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[14] The Aamodts' petition for review in the court of appeals did state tersely that the restart authorization "violated the National Environmental Policy Act." However, it is the general practice in the courts of appeals to treat issues as waived if they are not briefed. *See, e.g., Bledsoe v. Garcia*, 742 F.2d 1237, 1244 (10th Cir. 1984); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3974 n.1 (1977). The Aamodts' cryptic statement in their petition for review was inadequate to perfect their appeal on this issue.

[15] The Aamodts argue, with considerable audacity, that the court of appeals "abdicated [its] judicial responsibility by refusing to consider the adequacy of the EIS . . ." (Aamodt Pet. 17.) Since the Aamodts never briefed the issue, it is understandable that the court did not decide it.

the court of appeals. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982); *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 235 (1976).

Finally, even if the Aamodts had properly raised their NEPA claim below, they would still surely lose on the merits. Like every other federal agency, the NRC is required to prepare a supplemental EIS only if there has been a *significant* change in environmental circumstances since the preparation of the initial EIS. 10 C.F.R. § 51.92(a) (1985); *see* 40 C.F.R. § 1502.9(c)(1) (1985); *Louisiana Wildlife Federation, Inc. v. York*, 761 F.2d 1044, 1050-53 (5th Cir. 1985). The Aamodts contend that a substantial release of radioactivity during the TMI-2 accident, as demonstrated by their health survey, constitutes a significant change in circumstances. Yet the NRC found that the health survey was unreliable, that the radiation released during the accident was negligible, and that the Aamodts' information failed to raise any significant environmental issue. In the absence of significant new information about the environmental impact of TMI-1's operation, a supplemental EIS is unnecessary. In short, the NEPA claim is groundless and presents no federal question worthy of Supreme Court review.

III. THE TMI-1 RESTART PROCEEDING WAS NOT A LICENSE AMENDMENT PROCEEDING

In one section of their petition, the Aamodts argue that the TMI-1 restart proceeding should be regarded as a license amendment proceeding. (Aamodt Pet. 17-20.) This, they believe, would give them greater hearing rights under section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a). Once again, the Aamodts miss the mark. The nature and scope of the restart proceeding were defined in the NRC's August 9, 1979 order. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station,

Unit 1), CLI-79-08, 10 N.R.C. 141 (1979). The proceeding was not a license amendment proceeding, but rather an enforcement proceeding to determine whether the suspension of the TMI-1 operating license should be lifted and if so, under what conditions. Nevertheless, the NRC conducted a full adjudicatory hearing on all issues relevant to restart of TMI-1 except for those issues that were tendered late and did not meet the Commission's normal standards for reopening the record. The same standard is used by the NRC for reopening license amendment proceedings. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 N.R.C. 1195, 1199 n.5 (1985) (license amendment proceeding relating to steam generator modifications). Thus, the Aamodts would have been entitled to no greater hearing rights even if the proceeding had been a license amendment proceeding.

The Aamodts attempt to support their argument by referring to "155 new conditions" that the NRC imposed on GPU Nuclear as a result of the restart proceeding. However, the Aamodts make no attempt to describe the conditions or to relate them in any way to the contentions they advanced during the proceeding. Nor do the Aamodts explain how they were injured or aggrieved by the conditions. To the contrary, the Aamodts admit that "(t)hese new conditions greatly modify the original license for the better, because they have added tremendously to the safe operation of Unit 1." (Aamodt Pet. 19 n.9.) No purpose would be served by granting review of agency action to which no one objects and which is in fact supported and applauded by the petitioners. In addition, the Aamodts are simply wrong as a matter of fact in attempting to characterize the conditions as license amendments. The court of appeals properly found that the conditions were not license amendments. *TMIA v. NRC*, 771 F.2d at 729-30 (Pet. App. 27A-28A). Again, this is a factual question unique to this particular case, and it is therefore not suitable for review on certiorari.

CONCLUSION

For all the foregoing reasons, GPU Utilities submit that the Aamodts' petition for certiorari should be denied.

Respectfully submitted,

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January 22, 1986